IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.10 OF 2005
AND
CHAMBER SUMMONS NO.968 OF 2005
IN
EXECUTION APPLICATIONN NO.183 OF 2004
IN
SUM.SUIT NO.1510 OF 2002

M/s.G.M.Breweries Ltd. ..Plaintiff.

V/s.

M/s.Siddhivinayak Builders & Anr..Defendant.

And

M/s.Panchsheel Realty Pvt.Ltd. ..Applicant/-obstructionist.

Mr.Rajiv Narula i/b Shaunak Satpute & Co. for applicant in chamber summons No.10/2005

Mr.O.A.Das for Judgment Creditor/Plaintiff.

Mr.Vijay Sutrale for applicant in Chamber summons No.968 of 2005.

CORAM: A.M.KHANWILKAR,J

DATE : AUGUST 22, 2005.

P.C. :

1. Chamber summons No.968 of 2005 is not on board. Upon mentioning, by consent of all parties, taken on board and heard alongwith chamber summons No.10 of 2005.

2. By this common order, both the chamber summonses are being disposed of. Both these chamber

summonses are for raising of attachment, in respect of the flat Nos.101, 101-A, 102 and 103 in the building known as Tulsi Tower, situated at TPS 51, Factory Lane, Borivali (W), Mumbai 400 092 and for consequential orders.

3. The above said flats have been attached in the execution proceedings in relation to the exparte decree passed on 11th December, 2003 in Summary Suit No.1510 of 2002. Warrant of attachment in respect of these flats were issued on 5th July, 2004 and the flats have been attached on 9th July, 2004. The chamber summons No.10 of 2005 has however, been filed on 10th January, 2005, before this court; whereas the chamber summons No.968 of 2005 has been filed on 30th July, 2005. These dates are relevant only to show that there is delay in taking out chamber summons, which is one of the objection raised by the Judgment creditor. In my view, however, the applicant in respective Chamber summonses cannot be non-suited on the ground of delay because the delay is not designed nor would help them in any manner. I am therefore, examining the case on merits.

4. In chamber summons No.10 of 2005, it is the case of the applicant therein that flat Nos.101,

101A, 102 and 103 referred to above have been purchased by the said applicant under Registered Agreement dated 11th March, 2003. Copy of the respective Registered Agreements are produced on record, which is not disputed. As a consequence to the Registered Agreement executed in favour of the applicant in respect of the respective flats, possession of the said flats was made over to the applicant, which can be discerned from the possession receipt produced on record. It is the case of the said applicant that thereafter, society of the occupants in the said building have been formed and the applicant is paying all the outgoings in respect of the said three flats to the society. On the above assertion, it is contended that the applicant has become owner in respect of the respective flats referred to above. It is further stated that Judgment debtor has no connection with the said flats. In fact all the flats have been purchased by the said applicant from Jyotsna Construction Pvt.Ltd., who is admittedly not the Judgment Debtor. Indeed, it is the case of the Judgment creditor that Mr. N.Mehta is one of the Director of said Jyotsna Construction Pvt.Ltd.. That however, will make no difference to the issue that arises for consideration in the present application.

5. In chamber summons No.968 of 2005, the applicant therein contends that she has purchased two flats being Flat No.101, 101-A from Jyotsna Construction Pvt.Ltd., pursuant to agreements dated 17th March, 1994. The said agreements were not registered. It is the case of the applicant in the said application that the applicant has now taken steps for registration of the documents by presenting it for confirmation before the authorities dated 16th August, 2004. On this basis, the applicant in chamber summons No.968 of 2005 claims right in respect of the flat Nos. 101 and 101-A. In other words, there is overlapping claim in respect of Flat Nos. 101 and 101A by the two obstructionist.

6. According to the Judgment creditor, contends learned counsel, the applicant in chamber summons No.10 of 2005 is not the real owner of the flats referred to above. According to him, the flat Nos. 101 and 101A were already purchased by the applicant in chamber summons No.968 of 2005 in the year 1994. On this basis, it is contended that the applicant in chamber summons No.10 of 2005 cannot succeed unless the claim of the applicant in chamber summons No.968 of 2005 was to be rejected. It is then contended

that in the event, applicant in chamber summons No.968 of 2005 were to succeed, the said applicant is still liable to pay certain amount under the agreement dated 17th March, 1994 to the Judgment Debtor and it is open to the Judgment creditor to proceed in respect of the said flat Nos.101 and 101-A to the extent of said outstanding amount receivable by the Judgment debtor.

7. I have considered the rival submissions. I have no hesitation in taking a view that the order of attachment passed in respect of the subject flat Nos.101, 101-A, 102 and 103 cannot be allowed to continue. This is so because, the Judgment creditor fairly concedes atleast to the limited extent that the said flats have been sold in favour of the respective person by Jyotsna Construction Pvt.ltd. under the agreements pressed into service. In so far as flat Nos. 102 and 103 are concerned, the ownership of the said flats has been transferred in favour of obstructionist No.1 (Panch Sheel Realty Pvt.Ltd.) by virtue of registered agreement and have been put in possession thereof; for which reason, attachment of the said flats cannot be continued. In so far as the claim of Obstructionist No.1 in respect of flat Nos. 101 and 101A is concerned, even the

same will have to be accepted as it is, for the time being, as the same is supported by documents which are registered documents, registered at earlier point of time on 11th March, 2003 i.e. much before the date of the order of attachment. If it is so, it necessarily follows, that the title in respect of the said flats has been transferred in favour of the Obstructionist No.1 with effect from 11th March, 2003; Besides, on and from 19th March, 2003 the Obstructionist No.1 is put in possession thereof by Jyotsna Construction Pvt.Ltd. who is not the Judgment debtor.

8. To get over this position, counsel for the Judgment Creditor would contend that, in fact, the Judgment Debtor, is in possession of the said property and the transaction in favour of Obstructionist No.1 is a facade, so as to deny the claim of the Judgment creditor. I find no substance in this contention. The documents in favour of Obstructionist No.1 are registered document. The property is sold by Jyotsna construction Pvt.Ltd. who is not the Defendant to the subject suit. So long as the registered document is not questioned or transaction is established to be fradulent, it is not open for this court to assume that the title has not

transferred in favour of the Obstructionist No.1. The fact that Nitin Mehta was found in possession of the disputed premises does not make any difference. The documents produced on record by the Obstructionist No.1 would clearly indicate that the possession of the said flats was given to them on 19th March, 2003. Thereafter, the applicant has made over those flats on "leave and licence" basis in favour of the M/s.Jyotsna Construction Pvt.Ltd. and its Group of companies, as seen from the Leave and Licence agreement, which is also registered document dated 22nd September, 2004. In that sense, the obstructionist No.1 continues to be in ownership and possession in law. Indeed, the defendant No.2 happens to be Director of the Jyotsna construction Pvt.Ltd. to whom premises are given on leave and licence. That does not mean that Defendant No.2 has acquired title in the premises. It wil have to be borne in mind that Jyotsna Construction Pvt.ltd. is a seperate juristic person.

9. Viewed in this perspective, the fact that the defendant No.2 was found to be in possession of the disputed flats will make no difference to the point in issue.

10. In the the companion chamber summons No.968 of 2005, the case of the applicant therein Obstructionist No.2 is that Flats No. 101 and 101-A have been purchased by her applicant in earlier point of time on 17th March, 1994. It is not in dispute that the said document is not a registered document. There is nothing on record to show that the Obstructionist No.2 was or is put in physical possession of the said flats by Jyotsna Construction Pvt.Ltd.. The Obstructionist No.2 as well as the Judgment creditor would however, rely on the confirmation deed dated 16th August, 2004, which has been presented for registration by the said applicant. Interestingly, M/s Jyotsna Construction Pvt.Ltd. is not signatory to the said deed of confirmation. The fact remains that registered documents in respect of the subject flats Nos. 101 and 101-A have been executed by authorised representative of Jyotsna Construction Pvt.Ltd. in favour of the Obstructionist No.1 on 11th March, 2003. It is not necessary for this Court to dwell upon the controversy about the title claimed by Obstructionists inter se. The only way, they (Obstructionist No.2) can succeed is by taking out appropriate proceedings, as may be permissible by law. So long as such proceedings are not taken out

and order passed by the competent court in favour of the Obstructionist No.2, it is not possible to accept her claim of having right, title and interest in the disputed premises.

11. Suffice it to observe that the attachment in respect of the disputed flats cannot be allowed to continue as neither the applicant in the respective chamber summonses nor M/s. Jyotsna Construction Pvt.ltd. is party to the suit. The fact that the defendant No.2 was found in possession, who happens to be director of Jyotsna Construction Pvt.Ltd. will make no difference for the reasons already mentioned earlier. Accordingly, the order of attachment dated 5th July, 2004 and all consequential steps taken on the basis of that order are set aside and be treated as quashed.

12. It is once again made clear that this order may not be considered as expression of opinion of the issues that may arise for consideration in the context of claim of Jayaben Hirji Shah, applicant in chamber summons No.968 of 2005 (Obstructionist No.2) in respect of flat No.101 and 101-A in Tulsi Tower, Borivli. It will be open to her to take such proceedings, as may be permissible in law. Counsel

for the applicant in Chamber summons No.10 of 2005 (obstructionist No.1) states that to enable the applicant in chamber summons No,968 of 2005 to take such proceedings and seek appropriate direction from the court of competent jurisdiction, will not create third party interest in flat No.101, 101-A. This statement is however, made without prejudice to the rights and contentions of M/s.Jyotsna construction Pvt.Ltd. in the proposed proceedings to be taken out by the Smt.Jayaben Shah. This statement will operate for a period of 6 weeks from today.

13. It will be open to the Judgment creditor to appear in the proposed proceedings to be taken out by Smt. Jayaben Shah to ask for appropriate relief, in respect of unpaid amounts under the agreement executed between Jayaben Shah and Jyotsna Construction Pvt.Ltd. dated 17th March, 1994. It will also be open to the Judgment Creditor to take out such other proceedings as may be advised and permissible in law. All questions in that behalf are left open.

14. Disposed of on the above terms.